

STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30<sup>TH</sup> JUDICIAL DISTRICT  
INGHAM COUNTY

LINDA A. WATTERS, COMMISSIONER,  
OFFICE OF FINANCIAL AND INSURANCE SERVICES  
FOR THE STATE OF MICHIGAN,

Petitioner,

vs.

File No. 03-1127-CR

THE WELLNESS PLAN,  
a Michigan Health Maintenance Organization,

Hon. William E. Collette

Respondent.

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GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
VICTOR S. VALENTI (P36347)  
Attorneys for Claimant  
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.  
19390 W. Ten Mile Road  
Southfield, MI 48075  
(248) 355-5555

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**NOTICE OF APPEARANCE**

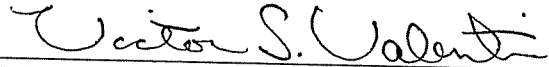
TO: LINDA A. WATTERS, COMMISSIONER,  
OFFICE OF FINANCIAL AND INSURANCE SERVICES  
FOR THE STATE OF MICHIGAN

THE WELLNESS PLAN

PLEASE TAKE NOTICE that FIEGER, FIEGER, KENNEY & JOHNSON, P.C.,  
by GEOFFREY N. FIEGER, ARNOLD J. MATUSZ and VICTOR S. VALENTI, have  
this day filed their Notice of Appearance of counsel for Benta Hurd, Individually and as  
Personal Representative of the Estate of Divine Walker, deceased, and the Estate of Devin

Walker, deceased, as an Interested Party in the above-captioned matter.

Respectfully submitted,



GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
VICTOR S. VALENTI (P36347)  
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.  
Attorneys for Claimant  
19390 W. Ten Mile Road  
Southfield, MI 48075-2463  
(248) 355-5555

Dated: April 20, 2005

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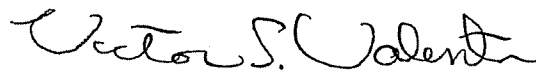
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APPEARANCE

FIEGER, FIEGER, KENNEY & JOHNSON, PC, by GEOFFREY N. FIEGER,  
ARNOLD J. MATUSZ and VICTOR S. VALENTI, hereby appear as counsel for Benta  
Hurd, Individually and as Personal Representative of the Estate of Divine Walker,  
deceased, and the Estate of Devin Walker, deceased, in the above-captioned matter.

Respectfully submitted,



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GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
VICTOR S. VALENTI (P36347)

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**MOTION TO CLASSIFY CLAIM OF INTERESTED PARTY**  
**BENTA HURD AS A CLASS 2 CLAIM**  
**UNDER MCL 500.8142 PRIORITY OF DISTRIBUTION SCHEME**

Benta Hurd, Individually, and as Personal Representative of the Estate of Divine Walker, deceased and of the Estate of Devin Walker, deceased, as an Interested Party, by her attorneys, Fieger, Fieger, Kenney & Johnson, P.C., submits this Motion and accompanying Brief and Exhibit pursuant to this Court's February 28, 2005 Order directing Interested Parties to brief the issue of how claims in the Rehabilitation will be classed under Chapter 81 and paid in these Rehabilitation proceedings.

For the Reasons fully set forth in the accompanying Brief, the Claim of Benta Hurd

should be classified as a Class 2 Claim under the classification scheme of MCL  
500.8142(1).

Respectfully submitted,



GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
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**BRIEF IN SUPPORT OF**  
**MOTION TO CLASSIFY CLAIM OF INTERESTED PARTY**  
**BENTA HURD AS A CLASS 2 CLAIM**  
**UNDER MCL 500.8142 PRIORITY OF DISTRIBUTION SCHEME**

**Introduction**

Benta Hurd, Individually, and as Personal Representative of the Estate of Divine Walker, deceased and of the Estate of Devin Walker, deceased, an insured of The Wellness Plan, contemporaneously herewith submitted a Proof of Claim (Exhibit 1) as an Interested Party against The Wellness Plan. The Claim arises out of the facts underlying her lawsuit filed in the Wayne Circuit Court (Case No. 04-436273-NH) which alleges that The

Wellness Plan and its employees or agents, actual or ostensible agents, Dr. Phyllis C. Mims M.D. and Dr. Malinda Gibson M.D. committed acts of professional negligence, medical malpractice that resulted in the personal injury and wrongful death of Benta Hurd and the personal injury and subsequent wrongful death of her twins, Divine Walker and Devin Walker, during the receipt of prenatal care on or about January 21, 2003.

For the reasons fully set forth in the Argument that follows, Benta Hurd's Claim is a claim "under policies for losses incurred, including third party claims," and should be classified as a Class 2 Claim under MCL 500.8142(1)(b).

### Argument

Benta Hurd has a claim against any policies of insurance The Wellness Plan held for errors and omissions/professional malpractice committed by The Wellness Plan or its agents in fact, ostensible agents or employees. The Claim should be classified as a Class 2 claim under the provision for "all claims under policies for losses incurred, including third party claims ... ."

MCL 500.8142(1)(b) provides in relevant part:

"[T]he priority of distribution of claims from the insurer's estate shall be in accordance with the order in which each class of claims is set forth in this section. Every claim in each class shall be paid in full or adequate funds retained for their payment before the members of the next class receive payment. Subclasses shall not be established within a class. The order of distribution of claims is as follows:

\* \* \*

(B) Class 2. Except as otherwise provided in this section, all claims under policies for losses incurred, including third party claims, . . .

\* \* \*

The Proof of Claim on behalf of Benta Hurd clearly resides in Class 2. As an insured and



a creditor of The Wellness Plan, Hurd is clearly also a “third party for purposes of the statute.” See for e.g.: MCL 500.811(2)(b); MCL 500.8138.

Section 8142 is based upon Section 47<sup>1</sup> of the Insurers Supervision, Rehabilitation and Liquidation Act which was promulgated by the National Association of Insurance Commissioners. The Model Act, with some adaptations, was based upon the Wisconsin Insurers Rehabilitation and Liquidation Act. The official comments of the Wisconsin act give an explanation of the purposes behind the particular classification of claim selected by the drafters of that act. According to these comments, the system of priority was chosen “based on the relative social and economic importance of the claims likely to be asserted against an insurer ... to carry out sound public policy by minimizing the damage done to the insured community when a insurer fails.” Quoted in State of Iowa v Iowa National Mutual Ins Co, 430 NW2d 420, 422-423 (Iowa 1988).

The progression of classes downward from Class 1 to Class 9 in Michigan’s §8142(1) demonstrates the legislative intent to first satisfy the costs and expenses of administration of the liquidation, second to pay for the claims of policyholders including third party claims, like the present Claim and then on down through government claims, to claims not under policies and general unsecured claims and remaining claims including finally those of shareholders. As other state appellate courts have explained, the equitable purpose of rehabilitation and liquidation is to protect policyholder consumers to the fullest extent possible. Minor v Stephens 898 SW2d 71, 78 (Ky 1995); Neff v Cherokee Ins Co,

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<sup>1</sup> Section 47(C) provides in relevant part that “All claims under policies ... for losses incurred, including the third party claims or covered obligations of the insurer.”

704 SW2d 1, 6 (Tenn 1986); State ex rel Long v Beacon Life Ins Co, 359 SE2d 508 (NC App 1987).

To that end, the supervision rehabilitation, and liquidation provisions of the insurance code, MCL 500.8101(2) and (3) provide in relevant part:

(2) This chapter shall be liberally construed to the effect the purpose stated in subsection (3).

(3) The purpose of this chapter is the protection of the interests of insureds, claimants, creditors, and the public . . .

Liberal (or equitable) construction “expands the meaning of the statute to meet cases which are clearly within the spirit or reason of the law, or within the evil which it was designed to remedy, providing such an interpretation is not inconsistent with the language used ... It means, not that the words should be forced out of their natural meaning, but simply that they should receive a fair and equitable interpretation with respect to the objects and purposes of the instrument.” Black’s Law Dictionary (6<sup>th</sup> ed 1990) pp 312-313.

While there is no Michigan authority construing the statute, cases from other jurisdictions construing states based on the Model Act are instructive. The language “claims under policies for losses incurred” defining Class 2 claims refers to consumer insurance policy claims. See Covington v Ohio General Ins Co, 99 Ohio St 3d 117 (2003)[holding claim under reinsurance agreement not a claim under policies for losses incurred even though O.R.C. 3903.42(B) did not specifically exclude reinsurance contracts unlike MCL 500.8142(1)(b)].

The plain intent of Class 2 is to benefit and protect insured members of the unsuspecting public. This is demonstrated by the inclusion of guaranty associations in

Class 2. These associations fund the payment of direct consumer insurance claims submitted by insureds when their insurance company has become insolvent. Covington, supra at 119. Likewise, a third type of Class 2 claim is a claim under a life insurance policy or annuity. These claims compensate individuals for losses that stem from the chance occurrences of life. Covington, supra at 120, citing Couch on Insurance (3d ed 1995). Cf: In the Matter of the Liquidation of National Family Ins Corp, 603 N2d 668 (Minn App 1999) [subrogation claims against insurer's policyholders which arose out of automobile accidents entitled to classification as "loss claims" under statutory category for losses incurred under Minn Stat. §60B44, Subd 4]. In short, the consumer protection aspect of Class 2 claims puts the Benta Hurd Claim squarely in that category under §8142(1) directly behind the administrative expenses class of the rehabilitation/insolvency.

As one Pennsylvania court explained:

If, after all, insurance is to perform its function of risk assumption and distribution of loss, then those statutes which govern it must first protect the risks it contracted to assume. Rehabilitation and liquidation are of vital importance to the consumer, who relies in the first place on the industry itself and then on its regulators for protection. No one can dispute that that consumer is not possessed of equal bargaining power, knowledge, or resources as that [ ] of the other major creditor classes in this proceeding.

Grode v The Mutual Fire, Marine and Inland Insurance Co, 572 A.2d 798 (Pa Commw 1990). Here the plain language of §8142, liberally construed, compels the conclusion that the Claim of Benta Hurd should be placed in Class 2 as a claim "under policies for losses incurred, including third party claims ... ."

**Relief Requested**

For all the foregoing reasons, the Claim of Interested Party Benta Hurd should be classified and paid under Chapter 81, MCL 500.8142 as a Class 2 Claim.

Respectfully submitted,



GEOFFREY N. FIEGER (P30441)  
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Dated: April 20, 2005

# EXHIBIT

1

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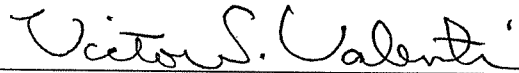
**PROOF OF CLAIM**  
**OF INTERESTED PARTY**  
**BENTA HURD**

Benta Hurd, whose address is 3410 W. Chicago, Apt. 301, Detroit, Michigan 48206, Individually and as Personal Representative of the Estate of Divine Walker, deceased, and the Estate of Devin Walker, deceased, by her attorneys, Fieger, Fieger, Kenney & Johnson, P.C., pursuant to MCL 500.8136 submits this Proof of Claim against The Wellness Plan and its employees or agents, actual or ostensible agents, Dr. Phyllis C. Mims M.D. and Dr. Malinda Gibson M.D., arising out of the professional negligence, medical malpractice that resulted in personal injury of Benta Hurd and the personal injury

and subsequent wrongful death of her twins, Divine Walker and Devin Walker, during the receipt of prenatal care on or about January 21, 2003. Additional specific facts about the Claim are set forth in the attached Notice of Intent [NOI] and Complaint which was originally filed in the Wayne County Circuit Court (Case No. 04-436273 NH).

Hurd claims a right of priority of payment as a Class 2 claim under MCL 500.8142(1)(b).

The Claim is for an unliquidated amount in excess of \$25,000 and is contingent upon the outcome of the lawsuit or an amicable settlement.



GEOFFREY N. FIEGER (P30441)  
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Dated: April 20, 2005

# EXHIBIT

A



## **SECTION 2912b NOTICE OF INTENT TO FILE CLAIM**

**This Notice is intended to apply to the following health care professionals, entities, and/or facilities as well as any employees or agents, actual or ostensible, thereof, who were involved in the treatment of the patient, Benta Hurd, baby boy Hurd, and baby girl Hurd.**

The Wellness Plan and their professional corporations, and all agents and employees, actual or ostensible, thereof, who furnished treatment to the patient Benta Hurd and Baby A and Baby B.

### **1. FACTUAL BASIS FOR CLAIM.**

Benta Hurd became pregnant and began receiving prenatal care through the Wellness Plan at Comprehensive Health Services of Detroit. The prenatal medical care and treatment was provided, in part, by Dr. Mims and/or Dr. Gibson who were the agents, servants and/or employees of the Wellness Plan.

On January 21, 2003 at approximately 0355 hours, Benta Hurd presented to Henry Ford Hospital with complaints of contractions. At the time, Ms. Hurd had a history of full term c-section at 40 weeks in 1996 (baby was approximately 5 pounds, 15 oz.), and a pre-term stillbirth at 24 weeks in 1994.

At her presentation to Henry Ford Hospital, Ms. Hurd was pregnant with twins and was approximately 33 to 37 weeks gestational age. She was experiencing contractions every two to three minutes since approximately midnight and did not complain of any prenatal complications.

Ms. Hurd was seen at the Henry Ford Triage Unit and then transferred to the Labor and Delivery Unit for assessment of pre-term labor. She was monitored for approximately one and a half hours and she was deemed to be at high risk, was transferred to Hutzel Hospital for further care and management. Ms. Hurd was admitted to Hutzel Hospital on January 21, 2003 at 1212 hours. She was seen and evaluated at Hutzel Hospital by Phyllis C. Mims, M.D. Ms. Hurd was also either seen and examined by Drs. Morgan and Gibson and/or the aforesaid physicians were consulted regarding the presence of Benta Hurd at Hutzel Hospital on January 21, 2003. Ms. Hurd was eventually discharged from Hutzel Hospital at approximately 1815 hours.

It was noted at either 1350 or 1450 hours that there was an inability to obtain continuous fetal heart tone tracings due to fetal movement. Dr. Morgan was made aware of this by the staff and the patient was to have an ultrasound. However, the patient's medical records do not contain a copy of the fetal heart tracings or an ultrasound of that date. The ultrasound report reflects for fetus #1 an ultrasound age of 21 weeks and for fetus #2, an

ultrasound age of 20 weeks and one day. The "gestational age estimate of the twin gestation" was listed as being 24/7 weeks with an EDC of March 24, 2003. However, the ultrasound report contained in the records dated 1-21-03 is from an ultrasound performed on November 8, 2002 performed by Mary King. There is no evidence in the patient's medical records produced by the defendant dated 1-21-03 that an ultrasound was in fact performed on said date prior to the patient's discharge from the hospital at 1815 hours. .

The patient was discharged without being advised to see her physician within one week. There is a notation that "growth ultrasound to be scheduled at next doctor's visit" on the discharge instructions given to the patient at approximately 1815 hours on January 21, 2003.

On January 31, 2003, Ms. Hurd returned to the Emergency Room at Hutzel Hospital and was directed to the Labor and Delivery Unit.

Her attending physician on this date was Melinda E. Gibson, M.D. The patient was admitted on January 31, 2003 at approximately 0255 hours and was seen once again by Dr. Morgan. The patient was admitted to the service of Dr. Gibson and was seen by Dr. Morgan. During the early morning hours, Benta Hurd was seen by an African American female resident, believed to be Dr. Morgan and a Asian American resident, whose identity is unknown at this time.

The Labor and Delivery note was authored by Dr. Darlene Morgan on 1-31-03 at approximately 0534 hours. The patient received magnesium sulfate for tocolysis and morphine for pain. It was noted that the fetal heart tones were "reassuring". The fetal heart tones for Twin A was noted to be 140, positive, variable to 90's-170's x 30-50 seconds. For Twin B, the fetal heart tones were noted to be 140. It was noted that the patient had documented cervical change compared with a recent visit of 1-21-03.

The patient was transferred to Labor and Delivery at approximately 4:20 am and a third year resident, believed to be Dr. Morgan, evaluated heart tones and the positioning of the babies and indicated that, as of 0530 hours, that the fetal heart tones were reassuring although some decelerations were noted.

Per the inpatient/operative note, Dr. Gibson was given a report by a nurse and a third year resident at approximately 7:00 am that the heart tones were reassuring and the patient was spacing out every 5 minutes and getting milder per the patient's report. However, the note goes on to indicate that there was a nursing shift change at 7:00 a.m. and that at 7:05 a.m. she was contacted by a nurse and told that the heart tones were "not reassuring in her assessment and fetal bradycardia down to the 80s was noted to start at 0708 hours on the review of the fetal heart strip".

At approximately 0708 or so, there was a severe bradycardia down to the 80s or 90s

that persisted and then there were no longer any fetal heart tones, at which point, it was documented that the resident was scanning the patient to confirm the location of fetal heart tones.

Dr. Gibson apparently then contacted the third year and fourth year residents at approximately 7:20 a.m. and scanned for fetal heart tones. Although the fourth year resident scanned for approximately 15 to 20 minutes, they were unable to locate any fetal heart tones in either baby. Per the record, Dr. Gibson was paged to the room at 0725 hours and arrived at 0755 hours. The membranes were ruptured and an attempt was made to put a scalp lead in to attempt reconfirm fetal heart tones which was unsuccessful.

The record states as follows: "Continued attempts were done at ultrasound to locate heart tones. The status of heart tones could not be confirmed for sure on Twin A or Twin B and it was my decision at this point at approximately 0755 to proceed with emergent c-section in an attempt to gain a viable fetus. It was obvious on my presentation to the room that we had not had adequate fetal heart tones in the last 45 minutes at least."

Ms. Hurd was taken to the Operating Room at 0805 hours and an emergent c-section began at 0810 and ended at 0850 hours.

At the time of delivery, Twin A had APGAR scores of 0, 0 and 0. Twin B had APGARS of 0, 0 and 4.

Following delivery, Dr. Gibson had a discussion with the cousin of Benta Hurd as well as the RN on the morning shift. The note indicates that Twin A, retrospectively, "had probably not been alive for at least a day because of the maceration of the skin and that full resuscitation efforts were being done on Twin B". It was expressed to the cousin and later to the patient's sister, that we had presumed during the course of her admission to the hospital that we were monitoring both babies, but perhaps, retrospectively, it looks as though we were only monitoring Twin B. My first review of the fetal heart tones was done at 0755 hours on my arrival to the Labor room after my page at 7:25. On my review of my strip, it is unclear whether we were truly monitoring both babies for the entire admission when she was first placed on the monitor at 4:10 in Labor and Delivery. It is unclear whether there are two distinct heart tones. On my retrospective review of the strip which I first reviewed at 0755, there was some suspicious decelerations intermittently throughout the morning between 4:00 and 7:00 with very poor short term variability and long term variability.

The Wellness Plan is vicariously liable for the actions and/or inactions of their agents, servants and employees, Dr. Mims and/or Dr. Gibson.

## **2 THE APPLICABLE STANDARD OF PRACTICE OR CARE ALLEGED**

The standard of care required of the above mentioned physicians and entities is that of an obstetrician/gynecologist and/or a resident in training rotating through the Ob/Gyn Service.

The standard of care required Hutzal Hospital, Dr. Phyllis C. Mims, M.D. and Darlene Morgan, M.D., on January 21, 2003 to do the following:

1. To perform a complete, proper and adequate evaluation of the patient, Benta Hurd to assure that there was a normal growth of the twins.
2. To perform adequate evaluations to obtain reassuring documentation and/or signs of fetal well-being, prior to discharging the patient home.
3. To perform an ultrasound
  - a. To assess the fetal growth including:
  - b. To clearly establish that both fetuses had normal heart rates, given the Benta Hurd's history of high risk pregnancy and prior poor reproductive history;
  - c. To obtain and document a sufficient degree of fetal well-being before discharge.
4. To schedule Ms. Hurd to be seen for a checkup prior to January 31, 2003;
5. To instruct the patient to see her Ob/Gyn shortly after discharge.

The standard of care required Hutzal Hospital, Melinda Gibson, M.D. and Darlene Morgan, M.D., on January 31, 2003 to do the following:

- 1 To recognize, as soon as possible, non-reassuring fetal heart tones on the monitor;
2. To properly interpret fetal monitor strips in order to insure the well-being of the fetuses;
- 3 To have the experience and qualifications necessary to understand that a fetal demise had occurred and not continually report that the fetal monitoring strips were "reassuring".

- 4 To require an immediate emergent c-section to protect the second twin.
- 5 To require an complete evaluation of the twins' fetal heart tones, immediately upon presentation since it was clear that the tracing was not reassuring;
6. Required the defendant not to wait or monitor Benta Hurd for an additional four hours before performing an emergent c-section when there was evidence on the fetal monitor strips of fetal distress and/or demise;
7. Required them to perform an emergent c-section before an agonal pattern appeared on the fetal monitor strips.
8. To understand that if one of the twins had already died, the potential for deterioration of the second twin is much greater. The threshold for emergency intervention, including c-section is much lower.
- 9 To have the knowledge, training and experience to determine that the mother's heart beat was not being properly interpreted as a "fetal heart rate".

**3. THE MANNER IN WHICH IT IS CLAIMED THAT THE APPLICABLE STANDARD OF PRACTICE OR CARE WAS BREACHED.**

The above-mentioned physicians, entities and staff failed to recognize fetal distress and/or fetal demise. They also failed to recognize the need for additional monitoring to ascertain fetal well-being on the presentation of January 21, 2003, including but not limited to the tests and procedures set forth above. In addition, failing to refer Benta Hurd to be seen by her attending Ob/Gyn within a period of time shortly after her discharge on the 21<sup>st</sup>, prevented further evaluation of the twin fetuses to assure their well-being.

On January 21, 2003, the above named physicians, entities, agents and servants failed to properly treat and monitor Benta Hurd and her twins which resulted in fetal demise and by delaying the delivery of the second twin to the point there was no chance of survival for that child.

This includes all the breaches of the standard of care set forth in Section 2 herein and those damages to Benta Hurd, individually, and allowable under the Michigan Wrongful Death Act.

**4. THE ACTION THAT SHOULD HAVE BEEN TAKEN TO ACHIEVE COMPLIANCE WITH THE STANDARD OF PRACTICE OR CARE.**

The above named physicians, entities and staff should have should have performed the procedures set forth in Sections 2 and 3 which would have resulted in continuing and appropriate monitoring of Benta Hurd and assured the well-being the twin fetuses. Because the Defendants failed to properly read and interpret the fetal monitor strips and report to the attending physician correct information contained on the fetal monitor strips, both Twin A and Twin B died. It would have been appropriate to perform an ultrasound on January 21, 2003 and not misinterpret a previous ultrasound of November 8, 2002 as contained in the record. There was a failure to determine that both fetuses had a normal heart rate and to establish and document the degree of fetal well-being prior to discharge of the patient and a delay in doing so on the second admission of 1-31-03

**5. THE MANNER IN WHICH THE BREACH WAS THE PROXIMATE CAUSE OF CLAIMED INJURY.**

Had the above named defendants, agents, employees and servants followed the appropriate standard of care as outlined in Sections 2, 3, and 4, Twin A and Twin B would have survived.

The patient would have been hospitalized on January 21, 2003 for continuing care and treatment and/or ascertained that there was sufficient and adequate fetal heart tones so that the patient could be discharged and followed more closely on an outpatient basis by her attending Ob/Gyn. If the fetal heart tones were not encouraging, further hospitalization and/or delivery would have prevented the tragic deaths of Twin A and Twin B. Neither of the aforesaid was performed and Benta Hurd was discharged and allowed to return home without appropriate testing and monitoring and/or referral back to her attending Ob/Gyn on a timely basis. As a result, Benta Hurd did not reappear to the hospital until January 31, 2003 at which time there was a serious compromise of one twin that should have been recognized immediately and that the second twin was being adversely affected. There was a significant delay in this determination which led to the subsequent death of Twin B.

**6. NAMES OF HEALTH PROFESSIONALS, ENTITIES, AND FACILITIES NOTIFIED:**

Hutzel Hospital, Melinda Gibson, M.D., Darlene Morgan, M.D., Phillis C. Mims, M.D., and all agents and employees, actual or ostensible, thereof, and their professional corporations, who furnished care and treatment to Benta Hurd, Twin A and Twin B, have been served with prior Notices of Intent and litigation against them has been commenced in the Wayne County Circuit Court, Case No: 04436273 NH.

The Wellness Plan and all agents and employees, actual or ostensible, thereof, and their professional corporations, who furnished care and treatment to Benta Hurd, Twin A and Twin

B are being served at this time with a Notice of Intent.

TO THOSE RECEIVING NOTICE: YOU SHOULD FURNISH THIS NOTICE TO ANY PERSON, ENTITY OR FACILITY, NOT SPECIFICALLY NAMED HEREIN THAT YOU REASONABLY BELIEVE MIGHT BE ENCOMPASSED IN THIS CLAIM.

IN THE EVENT THAT ONE OR MORE OF THE NAMED POTENTIAL DEFENDANTS FEEL THAT THE NOTICE OF INTENT IS DEFECTIVE FOR ANY REASON, PLEASE ADVISE IMMEDIATELY OF THE SPECIFIC CONCERNS THAT YOU HAVE SO THAT DETERMINATION CAN BE MADE WHETHER A REVISION IS NECESSARY AND/OR WARRANTED.

Respectfully submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

By:

---

GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
Attorneys for Plaintiff  
19390 West Ten Mile Road  
Southfield, MI 48075  
(248) 355-5555

DATED : December 7, 2004

# EXHIBIT

## B



STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF WAYNE

BENTA HURD, Individually and as  
Personal Representative of the  
Estate of DIVINE WALKER and  
the Estate of DEVIN WALKER,

Plaintiff,

Case No: 04-  
Hon:

-NH

v.

DMC HOSPITAL PARTNERSHIP, an assumed name  
for HARPER-HUTZEL HOSPITAL,  
a Domestic Nonprofit Corporation;  
DARLENE MORGAN, MD.;  
PHYLLIS C. MIMS, M.D.;  
MALINDA GIBSON, MD.

Defendants.

\_\_\_\_\_  
**FIEGER, FIEGER, KENNEY & JOHNSON, P.C.**  
**GEOFFREY N. FIEGER (P30441)**  
**ARNOLD J. MATUSZ (P33203)**

Attorneys for Plaintiff  
19390 W. 10 Mile Road  
Southfield, MI 48075  
(248) 355-5555  
\_\_\_\_\_

**COMPLAINT AND DEMAND FOR JURY TRIAL**

**There is no other civil action arising out the  
same transaction of occurrence as alleged  
in this complaint.**

\_\_\_\_\_  
**ARNOLD J. MATUSZ, P-33203**

NOW COMES the Plaintiff, BENTA HURD, Individually and as Personal

Representative of the Estate of DIVINE WALKER and DEVIN WALKER, by and through her attorneys, FIEGER, FIEGER, KENNEY & JOHNSON, P.C., and hereby complains against the above-named Defendant as follows:

**COMMON ALLEGATIONS**

1. At the time period in question, Plaintiff BENTA HURD was a resident of the City of Detroit, County of Wayne, State of Michigan.
2. At all times relevant hereto, Defendant, HARPER- HUTZEL HOSPITAL, (operating under the assumed name of DMC HOSPITAL PARTNERSHIP, ) hereinafter referred to as HUTZEL HOSPITAL) was a domestic non-profit corporation doing business in the city of Detroit, County of Wayne, State of Michigan and is duly organized and existing under and by virtue of the laws of the State of Michigan.
3. The amount in controversy exceeds Twenty-Five Thousand (\$25,000.00) Dollars and is otherwise subject to the jurisdiction of this Court.
4. That the incident in question which led to this lawsuit occurred in the City of Detroit, County of Wayne, State of Michigan.

WHEREFORE, Plaintiff requests that this Honorable Court enter a Judgment in her favor and against Defendants in an amount they are found to be entitled to in excess of Twenty Five Thousand (\$25,000) Dollars, plus interest, costs and attorneys.

**FACTUAL ALLEGATIONS**

5. Plaintiff hereby realleges and restates each and every allegation contained in

Paragraphs 1 through 4 as if fully stated herein.

6. Plaintiff, BENTA HURD was pregnant and began receiving prenatal care through the Wellness Plan at the Comprehensive Services of Detroit.
7. On or about January 21, 2003, at approximately 0355 hours, Plaintiff BENTA HURD, presented to Henry Ford Hospital with complaints of contractions. At that time she was noted to have a history of a full-term c-section at 40 weeks gestational age in 1996 and that said child was born weighing approximately 5 pounds, 15 ounces.
8. Her history also indicated that she suffered a pre-term stillbirth at approximately 24 gestational age in 1994.
9. At the time of her presentation to Henry Ford Hospital, Ms. Hurd was pregnant with twins who were approximately 33 to 37 weeks gestational age.
10. Ms. Hurd was seen in the Triage Unit at Henry Ford Hospital and subsequently transferred to the Labor and Delivery Unit.
11. Plaintiff, Benta Hurd, was monitored at Henry Ford Hospital for approximately 1 to 1.5 hours and was deemed to be at a high risk and therefore transferred to Hutzel Hospital for further care and management.
12. Benta Hurd was admitted to Hutzel Hospital on January 21, 2003 at approximately 1212 hours.
13. Ms. Hurd was seen and evaluated at Hutzel Hospital by Phyllis C. Mims, M.D.
14. On the aforesaid date, Ms. Hurd was seen and/or examined and/or received a consult by Dr. Darlene Morgan and Dr. Malinda Gibson.

15. Both Dr. Morgan and Dr. Gibson either saw Benta Hurd or were consulted by Phyllis C. Mims, M. D. regarding the presence of Benta Hurd in the Emergency Department at Hutzel Hospital on January 21, 2003.
16. After examination and consultation, Ms. Hurd was discharged from Hutzel Hospital at approximately 1815 hours.
17. Prior to the discharge, it was noted at either 1350 or 1450 hours that there was an inability to obtain continuous fetal heart tone tracings "due to fetal movement".
18. Defendant, Dr. Morgan was made aware of this by the staff and decided that the patient was to have an ultrasound.
19. Dr. Morgan and/or Dr. Mims advised Defendant Dr. Gibson of their findings on the patient while she was at Hutzel Hospital on January 21, 2003.
20. The medical record from Hutzel Hospital for January 21, 2003 do not contain a copy of the fetal heart tracings and/or an ultrasound for that date.
21. There was reference in the medical records that the ultrasound report reflected that Fetus #1 had an ultrasound age of 21 weeks and Fetus #2 had an ultrasound age of 20 weeks and one day.
22. The records reflect that there was a gestational age estimate of the Twin gestation being 24/7 weeks with an EDC of March 24, 2003.
23. The medical records, however, reflect that the ultrasound report contained in the records dated 1-23-03 is in fact an ultrasound that had been performed on November 8, 2002 by a Mary King.
24. That the medical records of the plaintiff fail to reveal that an ultrasound was in fact

performed prior to her discharge on January 23, 2003 at approximately 1815 hours.

25. The patient was discharged from Hutzel without being advised to see her physician within one week.
26. On or about January 31, 2003, Ms. Hurd returned to the Emergency Department at Hutzel Hospital and was thereafter directed to the Labor and Delivery Unit.
27. Defendant, Malinda E. Gibson, M.D. is listed as the attending physician for Plaintiff Benta Hurd at this presentation.
28. Plaintiff, Benta Hurd was admitted at approximately 0255 hours on January 31, 2003.
29. During the early morning hours of the admission, Ms. Hurd, was seen by an African American female resident and an Asian American resident, one of which is believed to be Defendant, Dr. Morgan. The identity of the other resident in unknown at this time.
30. The Labor and Delivery note was authored by Defendant, Dr. Darlene Morgan at approximately 0534 hours.
31. Ms. Hurd was administered Magnesium Sulfate for tocolysis and was administered Morphine for pain.
32. The medical records reflect that the fetal heart tones for the twin pregnancies were "reassuring".
33. The fetal heart tones for Twin A were noted to be 140, positive, variable to 90s to 170s x 30 to 50 seconds.
34. The medical records reflect that for Twin B, the fetal heart tones were noted to be

140.

35. It was further noted that the patient had a documented cervical change compared with the visit of January 21, 2003.
36. Ms. Hurd was transferred to Labor and Delivery at approximately 0420 hours and a resident, believed to be Dr. Morgan, evaluated the heart tones and the positioning of the baby.
37. The medical records reflect that at 0530 hours, the fetal heart tones were noted to be reassuring although some decelerations were noted.
38. Per the medical records, the attending physician, Dr. Gibson, was provided a report by a nurse and a third year resident at approximately 0700 hours that the heart tones were "reassuring" and the patient's spacing was every five minutes and getting milder per the patient's report.
39. The medical records, however, further reflect that there was a nursing shift change at 0700 hours and that at 0705 hours the new nurse contacted Dr. Gibson to advise her that the heart tones were "not reassuring".
40. The medical records reflect that Dr. Gibson was advised that there was "fetal bradycardia down to the 80s which was noted to start at 0708 hours on review of the fetal heart strip".
41. At approximately 0708 hours, there was severe bradycardia down to the 80s or 90s that persisted and there were no longer fetal heart tones.
42. At approximately 0720 hours, Dr. Gibson contacted the third and fourth year residents, one of which is believed to be Dr. Morgan, to scan the patient for fetal

heart tones.

43. It was noted that the fourth year resident scanned for approximately 15 to 20 minutes and was unable to locate any fetal heart tones in either fetus.
44. Per the medical records, Defendant, Dr. Gibson was paged to the room at 0725 hours and arrived at 0755 hours.
45. At that time, the patient's membranes were ruptured and an attempt was made to put in a scalp lead in an attempt to reconfirm fetal heart tones, however, this was unsuccessful.
46. The medical record further states as follows: "Continued attempts were done at ultrasound to locate heart tones. The status of heart tones could not be confirmed for sure on Twin A or Twin B and it was my decision at this point, at approximately 0755 hours to proceed with emergent c-section in an attempt to gain a viable fetus. It was obvious on my presentation to the room that we had not had adequate fetal heart tones in the last 45 minutes, at least".
47. Ms. Hurd was taken to the operating room at 0805 hours and an emergent c-section began at 0810 hours and was completed at 0850 hours.
48. At the time of delivery, Twin A had APGAR scores of 0, 0, and 0.
49. At the time of delivery, Twin B had APGAR scores of 0, 0 and 4.
50. Following delivery, the medical records reflect that "Twin A, retrospectively, had probably not been alive for at least a day because of maceration of the skin and that full resuscitation efforts were being done on Twin B".
51. That thereafter, Twin B, died.

52. The defendants advised Ms. Hurd that although they thought they had been monitoring fetal heart tones for both babies, they were probably, in essence, only monitoring the fetal heart tones of Twin B.
53. That as a result of the negligence of the Defendants, Twin A died in utero and Twin B died following emergent c-section delivery.

WHEREFORE, Plaintiff requests that this Honorable Court enter a Judgment in her favor and against Defendants in an amount they are found to be entitled to in excess of Twenty Five Thousand (\$25,000) Dollars, plus interest, costs and attorneys.

**COUNT I**  
**NEGLIGENCE, GROSS NEGLIGENCE AND**  
**WILLFUL AND WANTON MISCONDUCT ON THE PART OF**  
**DEFENDANTS, DARLENE MORGAN, M.D., MALINDA GIBSON, M.D.**  
**AND PHYLLIS C MIMS M.D.**

54. Plaintiff hereby realleges and restates each and every allegation contained in Paragraphs 1 through 53 as if fully stated herein.
55. In treating Plaintiff Benta Hurd and her unborn children, each of the Defendants, Darlene Morgan, M.D. , Malinda Gibson, M.D, and Phyllis C. Mims, M.D. , were required to exercise ordinary care, skill and ability which is ordinarily exercised by physicians in the same or similar circumstances, and which are exercised by other hospitals and physicians to insure the proper diagnosis, treatment and/or procedures were performed upon Plaintiff Benta Hurd , by Defendants, Darlene Morgan, M.D. , Malinda Gibson, M.D, and Phyllis C. Mims, M.D. , and other employees, agents and servants of Defendant, Hutzal Hospital.



56. That Defendants, Darlene Morgan, M.D. and Phyllis C. Mims, M.D. , on January 21, 2003, failed to exercise reasonable and ordinary care, skill and ability, which was required in treating Plaintiff Benta Hurd and that they were negligent in the following particulars, which are listed by way of illustration and not limitation, and include the following:

- a. To perform a complete, proper and adequate evaluation of the patient, Benta Hurd to assure that there was a normal growth of the twins.
- b. To perform adequate evaluations to obtain reassuring documentation and/or signs of fetal well-being, prior to discharging the patient home.
- c. To perform an ultrasound
  - i. To assess the fetal growth including:
  - ii. To clearly establish that both fetuses had normal heart rates, given the Benta Hurd's history of high risk pregnancy and prior poor reproductive history;
  - iii. To obtain and document a sufficient degree of fetal well-being before discharge.
- d. To schedule Ms. Hurd to be seen for a checkup prior to January 31, 2003;
- e. To instruct the patient to see her Ob/Gyn shortly after discharge.

57. That in the event that Defendant, Malinda Gibson, M.D. was consulted and/or made aware of the medical care and treatment being rendered to Plaintiff, Ms. Hurd on January 21, 2003, and Hutzel Hospital by Defendant, Phyllis C. Mims, M.D., and Darlene Morgan, M.D., then Malinda Gibson violated the standard of care by failing to exercise ordinary and reasonable care, skill and ability which was required in treating Plaintiff, Ms. Hurd and that she was negligent in the following particulars, which are listed by way of illustration and not limitation and include the

following:

- a. To perform a complete, proper and adequate evaluation of the patient, Benta Hurd to assure that there was a normal growth of the twins.
- b. To perform adequate evaluations to obtain reassuring documentation and/or signs of fetal well-being, prior to discharging the patient home.
- c. To perform an ultrasound
  - i. To assess the fetal growth including:
  - ii. To clearly establish that both fetuses had normal heart rates, given the Benta Hurd's history of high risk pregnancy and prior poor reproductive history;
  - iii. To obtain and document a sufficient degree of fetal well-being before discharge.
- d. To schedule Ms. Hurd to be seen for a checkup prior to January 31, 2003;
- e. To instruct the patient to see her Ob/Gyn shortly after discharge.

58. That Defendants, Malinda Gibson, M.D. and Darlene Morgan, M.D. , on January 31, 2003, failed to exercise reasonable and ordinary care, skill and ability which was required in treating the plaintiff, Ms. Hurd, and that they were negligent in the following particulars which are listed by way of illustration and not limitation and include the following:

- a. Failure to recognize, as soon as possible, non-reassuring fetal heart tones on the monitor;
- b. Failure to properly interpret fetal monitor strips in order to insure the well-being of the fetuses;
- c. Failure to have the experience and qualifications necessary to understand that a fetal demise had occurred and not continually report that the fetal monitoring strips were "reassuring".

- d. Failure to require an immediate emergent c-section to protect the second twin.
- e. Failure to require an complete evaluation of the twins' fetal heart tones, immediately upon presentation since it was clear that the tracing was not reassuring;
- f. Failure to monitor Benta Hurd for an additional four hours before performing an emergent c-section when there was evidence on the fetal monitor strips of fetal distress and/or demise;
- g. Failure to perform an emergent c-section before an agonal pattern appeared on the fetal monitor strips.
- h. Failure to understand that if one of the twins had already died, the potential for deterioration of the second twin is much greater. The threshold for emergency intervention, including c-section is much lower.
- i. Failure to have the knowledge, training and experience to determine that the mother's heart beat was not being properly interpreted as a "fetal heart rate".

- 59. That the negligence set forth above on January 21, 2003 was the direct and proximate cause of the death of Twin A and injury to Twin B.
- 60. That the violations of the standard of care set forth above which occurred on January 21, 2003, were the direct and proximate cause of the death of Twin A and the injuries and damages to Benta Hurd.
- 61. That the violations of the standard of care set forth above which occurred on January 31, 2003, were the direct and proximate cause of the death of Twin A and the injuries and damages to Benta Hurd.
- 62. That the above cited failures of the Defendants to properly treat Plaintiff, Benta Hurd, and her unborn children constituted negligence, malpractice and wilful and

wanton disregard for the Plaintiff Decedents' health and safety.

63. That as a direct and proximate result of Hutzel Hospital's negligent acts and/or omissions, Plaintiff Benta Hurd suffered damages including but not limited to:

- a. Physical pain and suffering;
- b. Emotional pain and suffering;
- c. Mental anguish;
- d. Fright and shock;
- e. Denial of social pleasures and enjoyments;
- f. Embarrassment, humiliation, mortification;
- g. Medical expenses;
- h. Lost wages;
- i. Loss of society and companionship;
- j. Funeral and burial expenses;
- k. Any and all damages allowed under the Michigan Wrongful Death Statute.
- l. Any and all further damages which may become known through the passage of time and/or the course of discovery.

64. That as a direct and proximate result of Hutzel Hospital's negligent acts and/or omissions, Plaintiffs Decedents, DIVINE WALKER and DEVIN WALKER, suffered damages including but not limited to:

- a. Physical pain and suffering;
- b. Emotional pain and suffering;
- c. Mental anguish;

- d. Fright and shock;
- e. Denial of social pleasures and enjoyments;
- f. Embarrassment, humiliation, mortification;
- g. Medical expenses;
- h. Lost wages;
- i. Loss of society and companionship;
- j. Funeral and burial expenses;
- k. Any and all damages allowed under the Michigan Wrongful Death Statute.
- l Any and all further damages which may become known through the passage of time and/or the course of discovery.

WHEREFORE, Plaintiff requests that this Honorable Court enter a Judgment in her favor and against Defendants in an amount they are found to be entitled to in excess of Twenty Five Thousand (\$25,000) Dollars, plus interest, costs and attorneys.

**COUNT II**  
**NEGLIGENCE, GROSS NEGLIGENCE AND**  
**WILLFUL AND WANTON MISCONDUCT ON THE PART OF**  
**DEFENDANT, DMC HOSPITAL PARTNERSHIP, AN ASSUMED NAME FOR**  
**HARPER-HUTZEL HOSPITAL**

- 65. Plaintiff hereby realleges and restates each and every allegation contained in Paragraphs 1 through 64 as if fully stated herein.
- 66 Defendant, Hutzal Hospital, is a medical hospital and as such is responsible for the care and treatment provided by their agents, servants and/or employees at said facility.

67. That Defendants, Malinda Gibson, M.D. and Darlene Morgan, M.D. and Phyllis C. Mims, M.D., were agents, servants and/or employees of Defendant, Hutzel Hospital, on the dates and times they provided medical care and treatment to Plaintiff Benta Hurd and Plaintiff Decedents, DIVINE WALKER and DEVIN WALKER.
68. That in addition to the aforesaid, Plaintiff Benta Hurd presented to Hutzel Hospital via their Emergency Department and, as such, Defendant, Hutzel Hospital, is vicariously liable for the actions of Defendants, Malinda Gibson, M.D. and Darlene Morgan, M.D. and Phyllis C. Mims, M.D.
69. That as a direct and proximate result of Hutzel Hospital's negligent acts and/or omissions, Plaintiff Benta Hurd suffered damages including but not limited to:
- a. Physical pain and suffering;
  - b. Emotional pain and suffering;
  - c. Mental anguish;
  - d. Fright and shock;
  - e. Denial of social pleasures and enjoyments;
  - f. Embarrassment, humiliation, mortification;
  - g. Medical expenses;
  - h. Lost wages;
  - i. Loss of society and companionship;
  - j. Funeral and burial expenses;
  - k. Any and all damages allowed under the Michigan Wrongful Death Statute.

1 Any and all further damages which may become known through the passage  
of time and/or the course of discovery.

70. That as a direct and proximate result of Hutzel Hospital's negligent acts and/or  
omissions, Plaintiffs Decedents, DIVINE WALKER and DEVIN WALKER,  
suffered damages including but not limited to:

- a. Physical pain and suffering;
- b. Emotional pain and suffering;
- c. Mental anguish;
- d. Fright and shock;
- e. Denial of social pleasures and enjoyments;
- f. Embarrassment, humiliation, mortification;
- g. Medical expenses;
- h. Lost wages;
- i. Loss of society and companionship;
- j. Funeral and burial expenses;
- k. Any and all damages allowed under the Michigan Wrongful Death Statute.

1 Any and all further damages which may become known through the passage  
of time and/or the course of discovery.

WHEREFORE, Plaintiff requests that this Honorable Court enter a Judgment in her  
favor and against Defendants in an amount they are found to be entitled to in excess of  
Twenty Five Thousand (\$25,000) Dollars, plus interest, costs and attorneys.

Respectfully Submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

---

GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
Attorneys for Plaintiff  
19390 West Ten Mile Road  
Southfield, MI 48075  
(248) 355-5555

Dated: November 23, 2004

**DEMAND FOR JURY TRIAL**

NOW COMES the Plaintiff, BENTA HURD, Individually and as Personal Representative of the Estate of DIVINE WALKER and DEVIN WALKER, , by and through her attorneys, FIEGER, FIEGER, KENNEY & JOHNSON, P.C., and hereby demands a trial by jury in the above captioned matter.

Respectfully Submitted,

FIEGER, FIEGER, KENNEY & JOHNSON, P.C.

---

GEOFFREY N. FIEGER (P30441)  
ARNOLD J. MATUSZ (P33203)  
Attorneys for Plaintiff  
19390 West Ten Mile Road  
Southfield, MI 48075  
(248) 355-5555

Dated: November 23, 2004



STATE OF MICHIGAN  
CIRCUIT COURT FOR THE 30<sup>TH</sup> JUDICIAL DISTRICT  
INGHAM COUNTY

LINDA A. WATTERS, COMMISSIONER,  
OFFICE OF FINANCIAL AND INSURANCE SERVICES  
FOR THE STATE OF MICHIGAN,

Petitioner,

vs.

File No. 03-1127-CR

THE WELLNESS PLAN,  
a Michigan Health Maintenance Organization,

Hon. William E. Collette

Respondent.

---

GEOFFREY N. FIEGER (P30441)  
REBECCA S. WALSH (P45331)  
VICTOR S. VALENTI (P36347)  
Attorneys for Claimant  
FIEGER, FIEGER, KENNEY & JOHNSON, P.C.  
19390 W. Ten Mile Road  
Southfield, MI 48075  
(248) 355-5555

---

**PROOF OF SERVICE**

STATE OF MICHIGAN     )  
                                      ) SS  
COUNTY OF OAKLAND    )

VICTOR S. VALENTI, being first duly sworn, deposes and says that he is an attorney with the law firm of Fieger, Fieger, Kenney & Johnson, P.C., and that on April 20, 2005, he served copies of Notice of Appearance, Appearance of counsel, Proof of Claim, Motion to Classify Claim of Interested Party Benta Hurd as a Class 2 Claim Under MCL 500.8142 Priority of Distribution Scheme and Proof of Service upon:

Honorable William E. Collette  
Ingham County Circuit Court  
3<sup>rd</sup> Floor, Mason Courthouse  
Mason, Michigan 48854


Wilson A. Copeland, II, Esq.  
Grier & Copeland  
615 Griswold Street #400  
Detroit, Michigan 48226

Mark Zausmer, Esq.  
Zausmer, Kaufman, August & Caldwell, P.C.  
31700 Middlebelt Road #150  
Farmington Hills, MI 48334

by enclosing copies of same in envelopes with first class postage fully prepaid thereon and  
depositing them in the United States mail at Southfield, Michigan.

  
VICTOR S. VALENTI

Subscribed and sworn to before me on April 20, 2005.

  
Kristine A. Gnagey, Notary Public,  
Wayne County, Michigan  
My Commission Expires: 9/4/2005